IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16/02/2004

CORAM

THE HON'BLE Mr. JUSTICE P.D.DINAKARAN

W.P.No.21051 of 2000

The Management of Rane Brake
Linings Ltd.,
Plot No.30, Industrial Estate,
Ambattur, Chennai 600 058. .. Petitioner

-Vs-

1. The Presiding Officer,
Industrial Tribunal,
Chennai.

2. C.C. Satheesh .. Respondents

Writ petition filed under Article 226 of The Constitution of India
praying for the issue of writ of certiorari to call for the records and quash
the award dated 21.09.2000 in complaint No.1/96 on the file of the first
respondent.

For Petitioner : Mr. John for
M/s. Gupta & Ravi

For Respondents : Mr. K.Chandru, Senior counsel for
Mr.T.Ramamoorthy for R2

:O R D E R

Learned counsel for the petitioner is not ready. Heard the learned
senior counsel for the second respondent.

2.1. Aggrieved by an order of termination dated 22.11.1995, the
second respondent has made a complaint under Section 33(A) of the Industrial
Disputes Act (hereinafter referred to as 'the Act') in Complaint No.1 of 1996
before the first respondent-Tribunal alleging that the impugned order of
termination is in violation of Section 33(2)(b) of the Act.

2.2 By G.O.(D) No.97 Labour and Employment Department dated 27.1.19
92, the Government by exercising the powers conferred under Section 1 0(1)(d)
of the Act, referred certain industrial disputes that arose between the
workman and management of Rane Brake Linings Limited, Madras, for

adjudication, which includes a dispute, "whether the demand for payment of wages, allowances and bonus to the following workmen as paid to other permanent workmen from the date of their first workman is justified and to what relief these 48 workmen are entitled?" (hereinafter referred to as the 'impugned dispute').

2.3 The second respondent is admittedly one among those 48 workmen whose dispute was referred to for adjudication in the said Government Order dated 27.01.1992.

2.4 Pursuant to the order of reference made in G.O.(D) No.97, Labour and Employment Department, dated 27.01.1992, the first respondent - Tribunal adjudicated the industrial dispute referred under the said Government order in I.D.No.7 of 1992.

2.5. During the pendency of the above I.D.No.7 of 1992, alleging that the petitioner committed misconduct of threatening and intimidating or annoying the co-employee, namely one V.Perumal, a disciplinary action was initiated against the second respondent. Accordingly, the second respondent was charged that he was "threatening or intimidating or annoying any employee within the factory premises or outside and causing violence against the company's officers and employees" and an enquiry was held wherein the said charge was proved. Consequently, the service of the second respondent was terminated by the management in the proceedings dated 22.11.1995. Hence, the second respondent made a complaint, namely compliant No.1 of 1996 in I.D.No.7 of 1992 invoking Section 33(A) of the Industrial Disputes Act, questioning the validity of the order of termination dated 22.11.1995, which was made during the pendency of the I.D.No.7 of 1992.

2.6. The first respondent Tribunal, by its award dated 01.10.1996 made in I.D.No.7 of 1992, while deciding the impugned dispute referred to above, held as follows:-
"According to the petitioner-union, 48 workmen were designated as " Apprentices" as a device to deny them the same benefit and wages paid to the permanent workmen. These workmen have been doing the work of the permanent workmen and they were called as "Apprentices" and paid the wages much lower than that of the permanen t workmen. Further it was also argued that these 48 workers were kept as apprentices for years together without confirmation as permanent workman and also by not to. The management has stated that as per Schedule-I Clause 2(g) wherein "Apprentice" is defined as:-
"learning shall not exceed one year for those with prescribed technical qualifications and 3 years for others."
Accordingly these 48 workmen who are not technically qualified were engaged in learned skilled work for the prescribed period. After raising this dispute, the management has regularised the services of all these 48 workmen and their services will be utilised as permanent workmen as and when vacancy arises. The petitioner-union has not stated any specific instances as to how the management denied the rights of these 48 apprentices. On the contrary, the statement made with regard to these persons are very general in nature. The management has also regularised all these persons and they are due to get

their share in the jobs as and when vacancy arises. None of these persons have been examined on the side of the petitioner to prove the allegations raised in the claim petition. The explanation offered by the management is plausible and reasonable. There is also nothing on record to say that the management has denied the wages and allowances due to them. The petitioner-union has demanded payment of wages allowances and bonus to the 48 apprentices on par with the permanent workmen. " Apprentices" are persons getting training before joining duty. Such persons are not entitled to get wages, allowances, bonus and other benefits on par with the permanent workmen. So, the claim of the petitioner-union that these 48 apprentices have to be paid wages allowances, bonus and other benefits on par with permanent workmen is not justified and therefore, they are not entitled to any relief. The issue is answered accordingly."

2.7. Thereafter, by an independent award dated 21.09.2000, the first respondent disposed the complaint No.1 of 1996 preferred by the second respondent herein under Section 33(A) of the Act, holding that the second respondent was a workman concerned in I.D.No.7 of 1992 with respect to the impugned dispute and consequently, set aside the order of termination dated 22.11.1995, as the same was given effect to without the approval of the first respondent-Tribunal as contemplated under Section 33(2)(b) of the Act. Incidentally, the Tribunal also held that the Management failed to substantiate the charge framed against the petitioner in the enquiry held in that regard and therefore, the consequential order of termination dated 22.11.1995 is illegal for want of proof.

2.8. Aggrieved by the same, the petitioner has filed the above writ petition seeking a writ of Certiorari to call for the records and quash the award dated 21.09.2000 in Complaint No.1/96 on the file of the first respondent.

3. Since the counsel for the petitioner is not ready, I am constrained to peruse the affidavit of the petitioner filed in support of the writ petition and hear the learned Senior Counsel appearing for the second respondent.

4. The writ petitioner/Management challenged the impugned award dated 21.09.2000 made in Complaint No.1 of 1996 on the following grounds:
i) The finding of the Tribunal that the second respondent is not guilty of the misconduct is erroneous; and
ii) the complaint lodged by the second respondent under Section 33 (A) of the Act is not maintainable in law, in view of the fact that the impugned dispute referred to above, was ultimately decided against the workman in the award dated 01.10.1996 and therefore, the second respondent was not a workman concerned with the impugned dispute within the meaning of Section 33(2)(b) of the Act.

5.1. Per contra, Mr.K.Chandru, learned Senior Counsel appearing for the second respondent-workman, invited my attention to the findings of the first respondent-Tribunal that the petitioner-Management failed to prove the

charge levelled against the second respondent, the same cannot be disturbed by way of a judicial review either by appreciating or re-appreciating the evidence even though another view than the one taken by the Tribunal is possible in that regard.

5.2. It is further argued that the fact that what is relevant for the purpose of bringing the second respondent within the purview of Section 33(2)(b) of the Act, is to decide whether the second respondent was a workman concerned in the impugned dispute, on the date of his termination dated 22.11.1995, but not on the date of the decision of the Tribunal on the impugned dispute. It is immaterial whether the result of the Tribunal on the impugned dispute was in favour or against the workman, whose service was terminated pending decision before the Tribunal on the impugned dispute.

6.1. From the rival contentions of the petitioner-Management and that of the second respondent-employee, the following issues arise for my consideration:-
(i) Whether the misconduct alleged against the second respondent was proved by the petitioner-Management?
(ii) Whether the application filed by the second respondent under Section 33(A) of the Act, placing reliance under Section 33(2)(b) of the Act, is maintainable in law?
(iii) To what reliefs, the parties are entitled to?

6.2.1. Issue No.(i) Whether the misconduct alleged against the second respondent was proved by the petitioner-Management?

6.2.2. The Tribunal, after due appreciation of the evidence relied upon by the petitioner/Management to prove the misconduct alleged against the second respondent and the evidence relied upon by the second respondent-employee denying the misconduct, held as follows:
".....It is regarding an assault on another worker. Admittedly the injured was not taken to any hospital and there is no wound certificate. There is also no police complaint. There is a complaint to the Management through Ex.M1, by Mr.V.Perumal, according to which the occurrence took place on the evening of 15.11.95, outside the gate of the factory. It was in pursuance of wordy quarrel between Mr.Perumal and the petitioner at 6.55 A.M. on that day. It should be proved. The mere production of statements recorded through Ex.M2 to M.5 will not do good. Since they were not subjected to cross-examination and their statements were recorded in the absence of petitioner no safe reliance can be made thereon. It is therefore, we have already said that the act of misconduct shall have to be proved in this Tribunal. An endeavour was made by the management by examining one Mr.Perumal, the aggrieved person as MW1; Mr.Manoharan, and Mr.Ramalingam, the eyewitnesses as MW2 and MW3 and Mrs.S.M.Myilvaganam, the Industrial Relation Manager as MW4 who is not an eye witness. Both MW2 and MW3 the witnesses claimed to be eye witnesses disowned that aspect and said in the course of Cross-examination that they did not see the occurrence. They also disowned their statements by saying that they signed the document according to the dictates of the officers of the management. They felt ignorant of the contents thereof. So what is remaining is the evidence of MW1, the injurer.

He is interested witness who has got some enmity with petitioner. There is no corroboration of his evidence. The fact that there was no police complaint, the fact there was no wound certificate, the circumstances that he was never admitted into any hospital may all make it appear that he might have said an exaggerated version. Any misconduct should be proved by legal evidence. We cannot come to any conclusion on conjectures and surmises. Therefore, there is no legal evidence in proof of the alleged misconduct."

6.2.3. It is settled position that in departmental proceedings, the disciplinary authority is the sole judge of facts and in case an appeal is presented to the appellate authority, the appellate authority has also the power and jurisdiction to re-appreciate the evidence and come to its own conclusion, on facts, being the sole fact-finding authorities. Once findings of fact, based on appreciation of evidence are recorded, the High Court in writ jurisdiction shall not normally interfere with those factual findings unless it finds that the recorded findings were based either on no evidence or that the findings were wholly perverse and/or legally untenable. The adequacy or inadequacy of the evidence is not permitted to be canvassed before the High Court. Since the High Court does not sit as an appellate authority over the factual findings recorded during departmental proceedings, while exercising the power of judicial review, the High Court cannot, normally speaking, substitute its own conclusion, with regard to the guilt of the delinquent, for that of the departmental authorities, vide Apparel Export Promotion Council v. A.K. Chopra, (1999) 1 SCC 759.

6.2.4. Hence, finding it difficult to interfere with the decision of the first respondent-Tribunal that the petitioner-Management failed to prove the misconduct alleged against the second respondent, issue No.(i) is answered in negative.

6.3.1. Issue No.(ii): Whether the application filed by the second respondent under Section 33(A) of the Act, placing reliance under Section 33(2)(b) of the Act, is maintainable in law?

6.3.2. In this connection, it is apt to refer Section 33(2)(b) and Section 33(A) of the Act, which reads as follows:-
" 33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings:-
33 (1) ...
33(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance which the standing orders applicable to a workman concerned in such dispute or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman -
(a) ...
(b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman:
Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

3 ...
4 ...
5 ...
33(A) Special Provisions for adjudication as to whether conditions of service etc. changed during pendency of proceedings " Where an employer contravenes the provisions of Section 33 during the pendency of proceedings before a Conciliation Officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal, any employee aggrieved by such contravention may make a complaint in writing in a prescribed manner,-
(a) to such Conciliation Officer or Board, and the Conciliation Officer or Board shall take such complaint into account in mediating in, and promoting the settlement of, such industrial dispute; and
(b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act shall apply accordingly."

6.3.3. It is not in dispute that on the date of termination of service of the second respondent herein viz., 22.11.1995, the impugned dispute, was pending for decision before the first respondent-Tribunal. As rightly pointed out by the learned Senior Counsel for the second respondent, the said decision was subsequently held against the employer. Therefore, as on the date of termination, viz., 22.11.1995, the second respondent, is, in my considered opinion, undoubtedly a workman concerned with the impugned dispute within the meaning of Section 33(2)(b) of the Act, and consequently, he is entitled to maintain the application under Section 33(A) of the Act, challenging the order of termination dated 22.11.1995 for the violation of Section 33(2)(b) of the Act.
6.3.4. The Apex Court, while dealing with the compliance of requirements of the approval of the Tribunal in the matter of termination of a workman concerned when the dispute is pending before the Tribunal, attracting Section 33(2)(b) of the Act, in Tamil Nadu State Transport Corporation vs. Neethivilangan, Kumbakonam, reported in (2001) 9 SCC 99, following the earlier decisions reported in AIR 1962 SC 1500 (Straw Board Mfg. Co. Ltd. v. Govind), 1978 2 SCC 144 (Pubjab Beverages (P) Ltd. v. Suresh Chand) and AIR 1966 SC 380 (Tata Iron and Steel Co. Ltd. v. S.N.Modak), held as follows:

" 10. Section 33 of the Act makes provision for ensuring that the conditions of service remain unchanged during pendency of certain proceedings. In sub-section (1) is incorporated the bar that no employer shall during pendency of any conciliation proceeding before a conciliation officer or a board or any proceeding before an arbitrator or Labour Court or Tribunal in respect of an industrial dispute, in regard to any matter connected with the dispute, alter to the prejudice of the workman concerned with such dispute, conditions of service applicable to them immediately before commencement of the proceedings; or for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise any workman concerned with such dispute, save with the express permission in writing of the authority before which the proceeding is pending.

11. The purpose of the prohibitions contained in Section 33 is twofold. On the one hand, they are designed to protect the workmen concerned during the course of industrial conciliation, arbitration and adjudication, against the employers harassment and victimisation on account of their having raised the industrial dispute or their continuing the pending proceedings, on the other, they seek to maintain status quo by prescribing management conduct which may give rise to fresh disputes which further exacerbate the already strained relations between the employer and the workmen. However, the section recognises the right of the employer to take necessary action like discharge or dismissal on justified grounds. To achieve this object, a ban has been imposed upon the employer exercising his common law, statutory or contractual right to terminate the services of his employees according to the contract or the provisions of law governing such service. The ordinary right of the employer to alter the terms of his employees services to their prejudice or to terminate their services under the general law governing the contract of employment has been barred subject to certain conditions.

12. Sub-section (2) deals with alteration in the conditions of service or the discharge or punishment by dismissal or otherwise of the workman concerned in the pending dispute but in regard to any matter not connected with such pending dispute. Though this provision also places a bar in regard to matters not connected with the pending dispute, it leaves the employer free to discharge or dismiss a workman by paying wages for one month and making an application to the authority dealing with the pending proceedings for its approval of the action taken. There is a distinction between matters connected with the industrial dispute and those unconnected with it. Thus, a balance between the interests of the workmen and the employer is sought to be maintained in the provisions of Section 33. The action taken under Section 33(2) will become effective only if 'approval' is granted. If the ' approval' is refused, the order of dismissal will be invalid and inoperative in law. In other words, the order of dismissal has to be treated as non est and the workman will be taken never to have been dismissed.

13. Considering the scheme of Section 33 this Court, in the case of Straw Board Mfg. Co. Ltd. v. Govind observed: (SCR pp. 624-25)
Thus sub-section (1) lays down that if an employer proposes to alter any conditions of service or proposes to punish or discharge a workman in relation to a matter connected with the dispute which might be pending before a Tribunal the employer must put such proposal before the Tribunal and obtain its express permission in writing before carrying out the proposal whether it be for alteration of any conditions of service or for punishment or discharge of a workman by dismissal or otherwise.
Sub-section (2)(a) on the other hand gives power to the employer to alter any conditions of service not connected with the dispute and this the employer can do without approaching at all the Tribunal where the dispute may be pending. It further permits the employer to discharge or punish, whether by dismissal or otherwise, any workman where this may be on account of any matters unconnected with the dispute pending before the Tribunal; but such discharge or dismissal is subject to the proviso, which imposes certain conditions on it. The intention behind enacting sub-section (2) obviously was to free the

employer from the fetter which was put on him under Section 33 as it was before the amendment in 1956 with respect to action for matters not connected with a dispute pending before a Tribunal. So far as conditions of service were concerned, if they were unconnected with matters in dispute the employer was given complete freedom to change them, but so far as discharge or dismissal of workmen was concerned, though the employer was given freedom, it was not complete and he could only exercise the power of discharge or dismissal subject to the conditions laid down in the proviso. Even so, these conditions in the proviso cannot be so interpreted, unless of course the words are absolutely clear, as to require that the employer must first obtain approval of the Tribunal where a dispute may be pending before passing the order of discharge or dismissal of a workman, for on this interpretation there will be no difference between Section 33(1)(b) and Section 33(2)(b) and the purpose of the amendment of 1956 may be lost. (emphasis supplied)

14. A Bench of three learned Judges of this Court, in the case of Punjab Beverages (P) Ltd. v. Suresh Chand held, inter alia, that the object of the legislature in enacting Section 33 clearly appears to be to protect the workman concerned in the dispute which forms the subject-matter of pending conciliation or adjudication proceedings against victimisation by the employer. But at the same time it recognises that occasions may arise when the employer may be justified in discharging or punishing by dismissal his employee and so it allows the employer to take such action, subject to the condition that in the one case before doing so, he must obtain the express permission in writing of the Tribunal before which the proceeding is pending and in the other, he must immediately apply to the Tribunal for approval of the action taken by him. Thereunder, this Court further held that the only scope of the inquiry before the Tribunal exercising jurisdiction under Section 33 is to decide whether the ban imposed on the employer by this section should be lifted or maintained by granting or refusing the permission or approval asked for by the employer. If the permission or approval is refused by the Tribunal, the employer would be precluded from discharging or punishing the workman by way of dismissal and the action of discharge or dismissal already taken would be void. (SCC p. 152, para 6) (emphasis supplied) This Court also observed that Section 33 in both its limbs undoubtedly uses language which is mandatory in terms. In this connection this Court specifically observed: (SCR p.385 : SCC p. 158, para 15)
Where the Tribunal entertains an application for approval under Section 33(2)(b) on merits, it applies its mind and considers whether the dismissal of the workman amounts to victimisation or unfair labour practice and whether a prima facie case has been made out by the employer for the dismissal of the workman. If the Tribunal finds that either no prima facie case has been made out or there is victimisation or unfair labour practice, it would refuse to grant approval and reject the application on merits. Then of course the dismissal of the workman would be void and inoperative, but that would be because the Tribunal having held that no prima facie case has been made out by the employer or there is victimisation or unfair labour practice, it has refused to lift the ban. (emphasis supplied)

15. In the case of Tata Iron and Steel Co. Ltd. v. S.N. Modak a Bench of three learned Judges of this Court, considered the effect of an order

of the Tribunal refusing to accord approval to the order of dismissal or discharge of the workman and held: (SCR p.418 B-E)
But it cannot be overlooked that for
the period between the date on which the appellant passed its order in question against the respondent, and the date when the ban was lifted by the final determination of the main dispute, the order cannot be said to be valid unless it receives the approval of the Tribunal. In other words, the order being incomplete and inchoate until the approval is obtained, cannot effectively terminate the relationship of the employer and the employee between the appellant and the respondent; and so, even if the main industrial dispute is finally decided, the question about the validity of the order would still have to be tried and if the approval is not accorded by the Tribunal, the employer would be bound to treat the respondent as its employee and pay him his full wages for the period even though the appellant may subsequently proceed to terminate the respondents services. Therefore, the argument that the proceedings if continued beyond the date of the final decision of the main industrial dispute would become futile and meaningless, cannot be accepted.

16. From the conspectus of the views taken in the decisions referred to above the position is manifest that while the employer has the discretion to initiate a departmental inquiry and pass an order of dismissal or discharge against the workman the order remains in an inchoate state till the employer obtains order of approval from the Tribunal. By passing the order of discharge or dismissal de facto the relationship of employer and employee may be ended but not the de jure relationship for that could happen only when the Tribunal accords its approval. The relationship of employer and employee is not legally terminated till approval of discharge or dismissal is given by the Tribunal. In a case where the Tribunal refuses to accord approval to the action taken by the employer and rejects the petition filed under Section 33(2)(b) of the Act on merits the employer is bound to treat the employee as continuing in service and give him all the consequential benefits. If the employer refuses to grant the benefits to the employee the latter is entitled to have his right enforced by filing a petition under Article 226 of the Constitution. There is no rational basis for holding that even after the order of dismissal or discharge has been rendered invalid on the Tribunals rejection of the prayer for approval the workman should suffer the consequences of such invalid order of dismissal or discharge till the matter is decided by the Tribunal again in an industrial dispute. Accepting this contention would render the bar contained in Section 33(1) irrelevant. In the present case as noted earlier the Tribunal on consideration of the matter held that the employer had failed to establish a prima facie case for dismissal/discharge of the workman, and therefore, dismissed the application filed by the employer on merits. The inevitable consequence of this would be that the employer was duty-bound to treat the employee as continuing in service and pay him his wages for the period, even though he may be subsequently placed under suspension and an inquiry initiated against him."

6.3.5. The ratio laid down in the catena of decisions of the Apex Court is squarely applicable to the case of the second respondent, who was terminated by order dated 22.11.1995, during the pendency of the dispute viz., I.D.No.7 of 1992, whereunder the second respondent was, concededly, a workman

concerned with the imp ugned dispute and therefore, the application filed by the second respondent under Section 33(A) of the Act, placing reliance under Section 33(2)(b) of the Act, is maintainable in law.

6.3.6. Issue No.2 is answered in negative.
6.4.1. To what reliefs, the parties are entitled to?

6.4.2. For the reasons explained above and the decisions arrived on the issue Nos.1 and 2 above, the order of termination dated 22.11.199 5, impugned in the above writ petition, is held as null and void for want of approval of the first respondent-Tribunal, as contemplated under Section 33(2)(b) of the Act and the same is set aside.

6.4.3. Issue No.(iii) is answered accordingly.

The writ petition is dismissed. No costs.

Index :Yes
Internet:Yes

sl/ATR

To

The Presiding Officer,
Industrial Tribunal,
Chennai.